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No. 94-1846

In The

Supreme Court of the United States

October Term, 1994

JAMES A. BARNARD,

Petitioner,

v.

JACKSON COUNTY, MISSOURI, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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ARGUMENT

I. THE COURT OF APPEALS' OPINION CONFLICTS WITH SEVENTH CIRCUIT DECISIONS HOLDING THAT AN EMPLOYEE MAY NOT BE DISCHARGED FOR SPEAKING OUT ON MATTERS WHICH HAVE ALREADY BEEN PUBLICLY REPORTED IN NEWSPAPERS, AND THAT THE EMPLOYEE'S FIRST AMENDMENT INTEREST IN FREE SPEECH AND THE PUBLIC INTEREST IN THE SUBJECT MATTER OF THE SPEECH OUTWEIGH THE EMPLOYER'S INTEREST IN CONFIDENTIALITY AND DISCIPLINE.

Respondents' denial notwithstanding, the content of Petitioner's speech to the Kansas City *Star* editors (the upcoming audit on the Medical Examiner's Office) was manifestly the cause of his discharge. Had he spoken with them about the weather or about local sporting events, or any subject other than the official wrongdoing described in the audit and in newspaper accounts inducing the formal investigation by his office, Petitioner would not have been discharged.

The significance of *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976), and *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), lies not in their adherence to the proper analytical framework but in their recognition that a governmental interest in maintaining confidentiality of an investigation disappears where the existence and purpose of the investigation, and the factual details involving the persons and subjects of the investigation, have already been reported in newspapers. In such circumstances, the public's right to know about the investigation and its details, and the employee's right to address those

points and to disclose new and unreported charges of official wrongdoing or improper conduct, outweigh the government's generalized interest in discipline.

Those factual circumstances are present here. The subjects contained in the audit which had already received press coverage are noted in the Petition for Writ of Certiorari (at pp. 4-6). The record does not corroborate respondents' assertion that Petitioner discussed any subject with the *Star* editors other than those subjects, but even if he disclosed his own conclusions and recommendations, the *Hanneman* Court afforded protection to the officers whose letter not only confirmed the factual details of a newspaper article but contained new charges of the police chief's improper conduct.

Clearly the Eighth Circuit failed to apply the principles set out by the Seventh Circuit. The conflict should be resolved by this Court.

The facts and issues in *Wright v. Ill. Dept. of Children & Family Services*, 40 F.3d 1492 (7th Cir. 1994), are unlike *Hanneman, O'Brien,* or this case. *Wright* did not involve newspaper accounts of a confidential investigation or discipline of a public employee for allegedly violating a confidentiality rule. The employee was disciplined for speech the Seventh Circuit determined to be unprotected (a report submitted to juvenile court in which she took an independent position that directly conflicted with the official position taken by the DCFS before that court, *id.* at 1503-4; and a letter which raised a legitimate concern that she was encouraging a lawsuit against the DCFS, *id.* at 1504-5). Evidence of the rancor and acrimony between Wright and her supervisors was undisputed. *Id.* at 1506.

The *Wright* Court did not cite *Hanneman* or *O'Brien* or refer to the principle of those cases. It did, however, acknowledge the employee's right to trial by jury on factual questions necessary to a resolution of the legal questions. *Id.* at 1507 & n. 6.

II. THE EIGHTH CIRCUIT'S FACT-FINDING DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO JURY TRIAL AND VIOLATED THE PROHIBITION IN *ICICLE SEAFOODS, INC. V. WORTHINGTON*, 475 U.S. 709 (1986).

Respondents' assertion that the facts found by the Eighth Circuit in reaching its legal conclusions either "were not in dispute or . . . had been admitted by Petitioner" (Resp.Br. 14-15) is wholly and utterly false. All of the findings made by the Eighth Circuit on its own had been hotly contested and the disputed evidence was placed before the district court (which made no factual findings) and the Eighth Circuit. Petitioner also set out some of that evidence in his Petition for Rehearing and/or Rehearing en Banc.

1) *The Eighth Circuit's finding that Petitioner frequently or routinely "leaked" information to the press concerning his audits.* Barnard consistently and repeatedly testified in deposition that, except for his June 1990 discussion of the Medical Examiner's Office audit with the *Star* editorial writers, he never gave the press any confidential information regarding the content of any unreleased audits:

Q. What sorts of information might [reporters] ask you for about ongoing audits?

A. They would say, "What's going on, what have you found?" I'd say, "Well, I can't say yet but it looks pretty interesting."

Q. You say you can't say yet, but that's not really giving them any information, is it?

A. No, it was discussing the audit, but I didn't give them a lot of information about it.

Q. What sorts of information did you give them?

A. Oh, I would say, "Well, I'm about two weeks away from issuing this audit. I think you will find that it's interesting." That basically was the type of information that I gave. (Barnard depo. pp. 105-6)

* * *

Q. I think you said that you routinely gave information to reporters about ongoing audits? . . .

A. In response to their questions, I would inform them as to the status of the audit, yes, sir. (Barnard depo. pp. 791-2)

Petitioner also repeatedly denied that he ever gave any draft versions of unreleased audits to the press at any time unless so instructed by his supervisor:

Q. You did release draft audit reports to the press prior to their becoming final; isn't that true?

A. No. (Barnard depo. p. 106)

* * *

Q. You did release audits to the press prior to their presentation to the legislature?

A. Only when instructed to by the finance and audit chairman. (Barnard depo. p. 107)

* * *

Q. Did you release a draft of the medical examiner's audit to the press?

A. No. (Barnard depo. pp. 169-70)

* * *

A. The impression I got was that [respondents Waits, Growney and Tindall] thought that I had been providing the press with copies of the audit before the legislature.

Q. Had you been?

A. No. (Barnard depo. p. 304)

* * *

Q. Did you ever release the physical report [of an audit] itself to anyone, to include the press, prior to giving it to the legislature?

A. No.

Q. Did you ever release the physical draft copy of an audit to anyone, to include the press, prior to submitting it to the auditee?

A. Only when instructed to by the chairman of the Finance and Audit Committee. (Barnard depo. p. 533)

2) *The Eighth Circuit's findings that the legislators' official tasks were disrupted, and that Barnard's frequent*

"leaks" to the press caused this disruption. Barnard not only denied ever "leaking" information in the manner described by the Eighth Circuit, but also disputed the existence of any disruption or disharmony among the legislators attributable to his speech activities in both the district court and the Eighth Circuit. In particular, he denied that any disruption or disharmony resulted from his June 1990 private discussion with the *Star* editors – the speech for which he was discharged.

Petitioner's main and reply briefs in the circuit court set out the evidence and arguments supporting the absence of any disruption or disharmony. Barnard argued that the legislators' claims of disruption are a pretext and unfounded. Despite their assertions during litigation that he had been "leaking" for years and that this adversely impacted on their legislative tasks, no legislator (including his supervisor, the Finance and Audit Committee chairman) ever placed any kind of criticism, warning or reprimand, or report of such, in his personnel file. No legislator ever criticized his performance. Instead, they told him he was doing a good job, and two legislators told him they saw no obstacle to his reappointment as auditor when the newly elected legislature took control in 1991.

The legislators made no claim that Petitioner's single discussion with the *Star* editors in June 1990 – the conduct for which he was discharged, and the only conduct relevant to the First Amendment issues under *Waters v. Churchill*, 114 S.Ct. 1878, 1891 (1994), and *Connick v. Meyers*, 461 U.S. 138, 149 (1983) – had any discernable impact on their legislative tasks, on the delivery of services to citizens of Jackson County, on county operations,

or on the performance of his own duties. Respondents did not even make such a claim in briefing to the district or circuit courts. Petitioner's discussion occurred in private and was never publicly reported. *See Rankin v. McPherson*, 483 U.S. 378, 388 n. 13 (1987) ("a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee"). There is no evidence in the record that any reporters, editorial writers, citizens or anyone else approached the legislators at any time after Petitioner's private discussion with the *Star* editors, either before or after formal presentment of the audit on June 29, 1990. There was, in fact, no disharmony or disruption of legislative tasks because of this discussion, there is no evidence of such in the record, and none has ever been claimed by respondents.

3) *The Eighth Circuit's finding that Petitioner's position involved a close working relationship with the county legislators.* In briefing submitted to the district and circuit courts, Barnard consistently denied working closely with any legislators. He testified that his job was essentially "investigative" and "was more of a watch-dog function on county government and county government expenditures." He was not a legislative aide or policy adviser and served no confidential role *vis-a-vis* the legislators. He spent very little time working with legislators; instead, he had a great deal of independence and spent his time conducting investigations, traveling, making reports, and supervising his staff. He had contact with the chairman of the Finance and Audit Committee only once a week, which was more than with any other legislator.

It was precisely because each of these factual issues was disputed that the district court made no findings as

to any of them, but reached a decision on a point of law only – that what Petitioner had to say to the *Star* editorial board was not "a matter of overriding public concern" (Petition for Writ, p. 29a). Respondents' brief underscores the vital importance of these findings to the Eighth Circuit's resolution of the appeal (Resp.Br. 11-12). The circuit courts are not authorized to engage in fact-finding under any circumstances, *Icicle Seafoods, Inc. v. Worthington*, *supra* 475 U.S. at 714, and the Eighth Circuit's violation of this principle deprived Petitioner of his constitutional right to trial by jury.

CONCLUSION

Petitioner respectfully urges the Court to grant the Petition for Writ of Certiorari to resolve the conflict among the circuits and to vindicate Petitioner's Seventh Amendment right to jury trial and its own prohibition against fact-finding by the circuit courts.

Respectfully submitted,

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